PEMBINAAN THIN CHAI SDN BHD

v.

CITRA MUDA SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-09-2000]
16 MAY 2002

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether a proper case for summary judgment - Claim for work done - Joint venture and partnership - Winding-up of partner - Implied authority of partner to contract - Notice of demand and amount claimed - Rules of the High Court 1980, O. 14*

The 1st defendant, the 2nd defendant and a consortium known as KCKN were parties to a joint venture which had awarded a building contract to the plaintiff. The plaintiff claimed that it had completed the works under the contract and demanded, through its solicitors, the final progress payment of RM351,386.84 and the retention sum of RM111,255.82. The defendants refused to effect payment. The instant appeal was from the decision of the deputy registrar dismissing the plaintiff's application for summary judgment against the 1st and 2nd defendants.

Held:

[1] The plaintiff had failed to cite KCKN as a party to the suit although it was the 'partnership' of the three parties in joint venture known as CM-RB-KCKN (comprising the 1st defendant, the 2nd defendant and KCKN) which had awarded the contract to the plaintiff. This was a triable issue. (pp 349 d-h & 350 e-g)

[2] The recent winding-up of the 1st defendant had shaken the substratum of the joint venture/partnership known as CM-RB-KCKN. The partnership accounts must be resolved amicably between the parties before an Order 14 application could be heard. Further, in the absence of an agreement to the contrary, the partnership could have automatically dissolved when the High Court ordered the 1st defendant to be wound-up. These triable issues could only be ventilated at a trial. (p 351 c-d, h)

[3] The 1st defendant had no implied authority to sign the main sub-contract on behalf of the 2nd defendant; therefore, the execution of the sub-contract by the 1st defendant could not have bound the 2nd defendant in law. This issue could only be determined at a proper trial. (p 353 b)

[4] The 2nd defendant claimed that it was never served with any notices of demand by the plaintiff. There also was no proof of posting or service of any letters or notices of demand. Furthermore, there were no supporting documents to prove the exact amount that was being claimed by the plaintiff. Hence, this was not a proper case for summary judgment. (pp 353 e & 356 a)

[Appeal dismissed.]

Case(s) referred to:
Anglo-Italian Bank v. Wells and Davies [1878] 38 LT 201 ***(refd)***
Alliance Bank Ltd v. Kearsley [1871] LR 6 CP 433 ***(refd)***
Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 ***(refd)***
Arcus v. Richardson [1933] NZLR 348 ***(refd)***
Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor [1991] 3 CLJ 2834; [1991] 2 CLJ (Rep) 294 ***(refd)***
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 ***(refd)***
Brettel v. Williams [1849] 4 Exch 623 ***(refd)***
Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 ***(refd)***
Crawford v. Stirling [1802] 4 Esp 207 ***(refd)***
Green v. Sutton [1840] 2 Mood & R 269 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Stead v. Salt [1825] 3 Bing 101 ***(refd)***
Steiglitz v. Egginton [1815] Holt NP 141 ***(refd)***
Tac Construction & Trading v. Bennes Engineering Bhd [1999] 2 CLJ 117 ***(refd)***

Legislation referred to:
Partnership Act 1961, ss. 3(1), 4, 11, 35, 36
Rules of the High Court 1980, O. 14, O. 77 r. 1

For the plaintiff - Ajit Kumar Hastir (Janice Yap Yen Lin); M/s Chooi & Co
For the 2nd defendant - Tengku Azlina Tengku Ismail; M/s Tengku Azlina, Rao, Low & Assocs

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Introduction

The learned deputy registrar heard and dismissed with costs the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court, 1980 ("RHC") against the second defendant as seen in encl. 8. Aggrieved by that decision, the plaintiff filed an appeal to the judge in chambers as seen in encl. 11. In encl. 8, the plaintiff sought for summary judgment against the second defendant in the following terms:

(1) for payment of the sum of RM351,386.84 with interest at the rate of 8% per annum from 8 April 1998 to the date of full payment;

(2) for payment of the sum of RM111,255.82 with interest at the rate of 8% per annum from 8 April 1998 to the date of full payment;

(3) any other relief which the court feels appropriate; and

(4) costs.

The plaintiff was only interested to pursue the matter against the second defendant. The first defendant was wound up by the Kuantan High Court on 20 June 2000 and perhaps it was because of this that the plaintiff left the first defendant alone. But the winding up of the first defendant was certainly a reckoning point in favour of the second defendant and I shall certainly allude to this very essential element in the later part of this judgment.

Facts

The statement of claim showed that the first defendant and the second defendant had entered into a joint venture agreement with a consortium known as Konsortium Citra Kontraktor Nusantara ("KCKN") which operated under the name and style of CM-RB-KCKN. Thereafter both the first and the second defendants together with KCKN awarded a contract known as the KL International Airport Aprons and Taxiways W2/X3-South, contract no: KLIA/d/RAO5/042/95 to the plaintiff by way of a letter dated 12 May 1997 and that very letter was exhibited as exhibit "CSPI" to the affidavit of Chai Seong Peng that was affirmed on 30 June 2000 as seen in encl. 7 and it was worded in this way:

CM-RB-KCKN JOINT VENTURE
Contact Address: 5th Floor, Block B, Wisma Semantan,
No. 12, Jalan Gelenggang, Bukit Damansara, 50490 Kuala Lumpur,
Malaysia.
Tel: (03) 2538421 Fax: (03) 2538431

Our Ref: CM/HQ/KLIA/21/4-97 12 May 1997

Pembinaan Thin Chai Sdn Bhd
9-2, Jalan SB Indah 1/2A
Off Jalan Balakong
Taman Sg. Besi Indah
43300 Seri Kembangan, Selangor

Attention: Mr. Chai Seong Peng

KL International Airport
Aprons & Taxiways W2/X3-South
Contract No. KLIA/D/RAO5/042/95

Subject: Laying of Pavement Quality Concrete-Labour and Equipment Only
Letter of Acceptance

Dear Sir,

With reference to our earlier letter dated 4 April 1997, and reference no. CM/ADM/SO/PTC/652/4-97, in which we advised that the Sub-contract Agreement would be issued shortly, we have pleasure in enclosing the Agreement for your acceptance and signature. The following should be noted:

1. This agreement has been prepared in accordance with the requirements of our Contract with the KLIAB using the standard forms contained herein, to which we are bound to conform.

2. This letter should be treated as the letter of Acceptance referred to in Article 2 (b) on page APP9/1 of the Articles of Agreement.

3. The Articles of Agreement should be signed and witnessed as noted, and the omission of the Performance Bond on pages APP 9/2 of the Articles of Agreement and APP 9/2 of the Conditions of Sub-Contract duly initialled.

4. The agreed rates for the work are shown in Table 1. Attached to the Articles of Agreement, which supercede those shown in your earlier quotation dated 24 February 1997, and have been initialled jointly on your letter of 24 February 1997 which is attached as part of the Sub-Contract documentation.

5. Your work will be measured as executed for final payment.

6. The programme is attached to Appendix A.

7. Completion of Appendices B and C of the Conditions will also be required and we can discuss these matters with you if necessary.

8. A retention sum of 5% of each Interim Certificate is to be deducted, and will be repaid three (3) months after final completion of the Works has been certified.

9. Please initial all pages and your return of the signed Sub-Contract Agreement to us by 31 May 1997 would be appreciated please, for regularisation and administration of contractual procedures.

Thank you for your co-operation in this matter.

Yours faithfully,
for and on behalf of
Citra Muda/Readybuilt/Konsortium Citra Kontraktor Nusantara Joint Venture

Sgd. (Illegible).
Siti Musyarofah
Managing Director
cc: - Mr. Martin Mc. Clenn, Construction Manager
- Mr. Tony Artlett, Q.S. Manager

It was said that the plaintiff had completed the works under the said contract in December 1997 in accordance with the terms thereto and had submitted the final progress claim dated 8 April 1998 for the sum of RM351,386.84. It was also said that on 1 April 1998, the retention sum amounting to RM111,255.82 became due for release to the plaintiff. By letters dated 18 June 1999 (see exh. "CSP3" of encl. 7) and 11 October 1999 (see also exh. "CSP3" of encl. 7) that were issued through the plaintiff's solicitors, the plaintiff demanded for the final progress claim amounting to RM351,386.84 and the retention sum amounting to RM111,255.82. Despite the aforesaid letters of demand, both the first and the second defendants together with KCKN had failed, refused and/or neglected to pay the sums as demanded or any part thereof.

It must be pointed out that the second defendant had filed its statement of defence on 25 February 2000 as seen in encl. 4. In *Tac Construction & Trading v. Bennes Engineering Bhd* [1999] 2 CLJ 117, where the defendant there had yet to file its statement of defence, I had this to say in regard to an O. 14 application (see p. 122 of the report):

It is now trite law that an Order 14 application is to enable a plaintiff to obtain a summary judgment without trial provided:

(1) the plaintiff can prove his claim clearly; and

(2) the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried.

To borrow the words of Mohamed Azmi SCJ in *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC, I must "be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable."

Triable Issues

There were triable issues in the present appeal, and I will now venture to itemise them.

(1) It was the stand of the second defendant that the plaintiff had failed to cite KCKN as a party to the suit bearing in mind that both the first and the second defendants together with KCKN had awarded the contract no: KLIA/d/RAO5/042/95 to the plaintiff. It seemed that the plaintiff had admitted that the joint venture agreement between the first and the second defendants with KCKN were in the nature of a partnership that operated the CM-RB-KCKN operations. And it was this partnership that awarded the contract no: KLIA/d/RA05/042/95 to the plaintiff. Order 77 r. 1 of the RHC states as follows:

> Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

and it is my considered view that it applies only to firms and single individuals suing or being sued in their firm or trading name. Now, under s. 3(1) of the Partnership Act 1961 (Act 135) a partnership is defined as the relation which subsists between persons carrying on business in common with a view to profit. In order to determine whether a partnership exists, it would be ideal to refer to the rules in s. 4 of the Partnership Act 1961 (Act 135) which according to *Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor* [1991] 3 CLJ 2834; [1991] 2 CLJ (Rep) 294 and *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11 FC were not exhaustive and that regard must be had to all the surrounding circumstances together with the intentions of the parties involved and the contracts which they have made. These cases merely enunciated general principles of law and in the context of the present appeal, it would be pertinent to examine the contract no: KLIA/d/RAO5/042/95. But alas that contract was not exhibited in the affidavit of Chai Seong Peng in encl. 7. What was exhibited was the sub-contract between:

Citra Muda Sdn Bhd/Reday Built/Konsorsium Citra Kontraktor Nusantara Joint Venture

and

Pembinaan Thin Chai Sdn Bhd

and that sub-contract bore the following number, namely, CMRBKCKNJV/KLIA/RAO5/C-01/97. To confound the matter further, the name of the second defendant that appeared in the sub-contract was "Reday Built" whereas the present suit from which the present appeal was related to, described the second defendant as "Readybuilt (M) Sdn Bhd." Going further and looking at the preamble to the sub-contract, the second defendant was described as "Readybuilt Sdn Bhd" and not as "Readybuilt (M) Sdn Bhd." These discrepancies when viewed in its correct perspective must be construed adversely against the plaintiff and it would certainly constitute a triable issue in favour of the second defendant. Going further still, the other partner to the joint venture was described in the sub-contract as "Konsorsium Citra Kontraktor Nusantara Joint Venture", whereas the preamble to the sub-contract described the other partner as "Citra Kontraktor Nusantara Joint Venture". The consortium known as "Konsortium Citra Kontraktor Nusantara" which was referred to as "KCKN" in the brief facts as alluded to earlier, was certainly a party to the joint venture agreement. KCKN or by whatever name it is called must be cited as a party in the present suit wherein the present appeal arose but this was not done at all. Perhaps, as was rightly submitted by the second defendant's counsel, the plaintiff should have commenced the suit against:

(1) Citra Muda Sdn Bhd

(2) Readybuilt (M) Sdn Bhd

(3) Konsortium Citra Kontraktor Nusantara (Ketiga-tiganya rakankongsi di bawah satu perkongsian yang dinamakan CM-RB-KCKN JOINT VENTURE).

Flowing from all these, the O. 14 application must fall in limine:

(2) The winding up order against the first defendant by the Kuantan High Court as alluded to earlier gave a different complexion to the present appeal. *Lindley and Banks on Partnership Law* at para. 24-25 carries the following legend:

Winding-up order.

An order for the winding-up of a corporate partner is the nearest equivalent to the bankruptcy of an individual.

and this must be read with s. 11 of the Partnership Act 1961 (Act 135) which enacts as follows:

Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

In essence, the winding up of the first defendant shall affect the joint venture partners as well. In this connection, the second defendant and KCKN would also be affected. Since the first defendant had been wound up, the partnership accounts must be resolved amicably between the parties thereto before the O. 14 application could be heard.

I must proceed further.

Section 35 of the Partnership Act 1961 (Act 135) provides as follows:

(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

and clearly under the above provisions, the partners may agree that death or bankruptcy shall not effect a dissolution but, in the absence of such an agreement, the partnership is dissolved upon any such occurrence by operation of law. In my judgment, an agreement between the partners must necessarily mean that an agreement between all of them entered into before the date of the relevant death or bankruptcy (*Arcus v. Richardson* [1933] NZLR 348) and that an agreement of this nature should be definite and certain. Here, the affidavit evidence did not make any reference to any agreement governing the dissolution of the partnership in the event of death or bankruptcy of any of the partners. It follows therefore that in the absence of such an agreement, the partnership would automatically be dissolved on 20 June 2000 when the Kuantan High Court made a winding up order of the first defendant. In sharp contrast would be the case of *Arcus v. Richardson (supra)* where the court there held that where an

arrangement that the partnership was not to be dissolved by the death or bankruptcy of a partner then the partnership would be construed to be for an undefined period of time.

A dissolution of the partnership by operation of law is provided for in s. 36 of the Partnership Act 1961 (Act 135). That section enacts as follows:

> A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

and it is a reflection of the common law rule that the parties to a contract are discharged from their obligation by the supervening illegality. This is the only section in the Partnership Act 1961 (Act 135) which compels dissolution, regardless of the wishes of some of the partners.

These legal niceties can only be ventilated to the fullest in the course of the trial.

The upshot of it all would be this. That the O. 14 application ought not to be entertained by this court.

(3) The sub-contract number CMR BKCKNJV/KLIA/RAO5/C-01/97 was executed by the first defendant and not by the second defendant. This averment was made by Radin Baharuddin bin Radin Haji Munir in his affidavit in reply that was affirmed on 21 July 2000 and filed on the same date as seen in encl. 9 at para. 8 thereto. There was no reply to this affidavit in reply in encl. 9 and so this very averment remained unchallenged (*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609). Incidentally there was no express authority given to the second defendant to execute the sub-contract and that being the case, the issue of an express authority can only be ventilated and determined at the trial proper. It must be borne in mind that a partner has no implied authority to bind the firm in the following situations:

(a) by executing a deed on behalf of the firm (*Steiglitz v. Egginton* [1815] Holt NP 141, [1814-23] All ER Rep 455; and *Green v. Sutton* [1840] 2 Mood & R 269, 174 ER 285);

(b) by giving guarantees (*Brettel v. Williams* [1849] 4 Exch 623, [1843-60] All ER 702) unless, of course, giving guarantees is the usual and the common line of business of the firm (*Crawford v. Stirling* [1802] 4 Esp 207, (1755-1802) All ER Rep 553);

(c) by submitting to arbitration (*Stead v. Salt* [1825] 3 Bing 101, 130 ER 452); and

(d) by operating a bank account in his own name (*Alliance Bank Ltd v. Kearsley* [1871] LR 6 CP 433).

In the context of the present appeal, the first defendant had no implied authority to sign the sub-contract on behalf of the second defendant and therefore the execution of the sub-contract by the first defendant could not, in law, bind the second defendant at all.

Radin Baharuddin bin Radin Hji Munir deposed in his affidavit in reply in encl. 9 in regard to the sub-contract and there he questioned the existence of the sub-contract. He emphasised that the sub-contract was not dated and he too highlighted the fact that the main contract was not exhibited at all by the plaintiff in encl. 7. As I said there was no reply to encl. 9, and, consequently, an O. 14 application would not be the appropriate course of action for the plaintiff to undertake.

(4) The letters of demand or the notices of demand as seen in exh. "CSP3" of encl. 7 dated 18 June 1999 and as seen in the same exhibit of the same enclosure dated 11 October 1999 which were, incidentally, alluded to earlier were not accompanied by any proof of posting. The second defendant disputed that these two letters of demand or notices of demand were ever received by them and bereft of the proof of service, the stand of the second defendant was that there was no cause of action against them. There was no attempt at all by the plaintiff to show by affidavit evidence that these two letters of demand or notices of demand were in fact served onto the second defendant like what the appellant in the case of *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1 SC did.

Next, the two letters of demand or the notices of demand merely claimed for the sum of RM351,386.84 and the sum of RM111,255.82 was not even mentioned at all. It would be ideal to reproduce these two letters of demand or the notices of demand. The letter of demand or the notice of demand dated 18 June 1999 was worded in this way (see exh. "CSP3" of encl. 7):

990377 AKH
18 June 1999

By A.R. Registered Post

CM-RB-KCKN Joint Venture
5th Floor, Block B
Wisma Samantan
No. 12, Jalan Gelenggang
Bukit Damansara
50490 Kuala Lumpur

Dear Sirs,

KLIA APRONS & TAXIWAYS W2/X3-SOUTH
CONTRACT NO. KLIA/D/RAO5/042/95
LAYING OF PAVEMENT QUALITY CONCRETE – LABOUR AND EQUIPMENT ONLY

We act for Pembinaan Thin Chai Sdn Bhd, the sub-contractor for the abovementioned works.

We are instructed by our client that despite they having completed the said works in accordance with the terms of the said sub-contract and having rendered to you their final progress claim dated 8 April 1998 for the sum of RM351,386.84, you have failed, refused and or neglected to pay to our client the said sum or any part thereof.

We are therefore instructed to demand from you, which we hereby do, the said sum of RM351,386.84.

TAKE NOTICE that unless you pay to our client the said sum of RM351,386.84 together with our notice charges of RM105.00 within SEVEN (7) DAYS from the date hereof, we have strict instructions to commence legal action against you to recover the same with interest and costs.

Yours faithfully,
for CHOOI & COMPANY

Sgd. (Illegible).
AJIT KUMAR HASTIR

Cc: client

While the letter of demand or the notice of demand dated 11 October 1999 was phrased in this manner (see also exh. "CSP3" of encl. 7):

990377 AKH
11 October 1999

BY A.R. REGISTERED POST

CITRA MUDA SDN BHD
5th Floor, Block B
Wisma Semantan
No. 12, Jalan Gelenggang
Bukit Damansara
50490 Kuala Lumpur

READYBUILT (M) SDN BHD
2050-1, Kompleks Belia 4B
Jalan Sentul Pasar
5100 Kuala Lumpur

Dear Sirs

KLIA APRONS & TAXIWAYS W2/X3-SOUTH
CONTRACT NO. KLIA/D/RAO5/042/95
LAYING OF PAVEMENT QUALITY CONCRETE – LABOUR AND EQUIPMENT ONLY

We act for Pembinaan Thin Chai Sdn Bhd, the sub-contractor for the abovementioned works.

We are instructed by our client that by a Letter of Acceptance dated 12 May 1997, our client was awarded the above contract by you, operating under the style 'CM-RB-KCKN Joint Venture' with your other joint venture partner Konsorsium Citra Kontraktor Nusantara.

We are further instructed by our client that despite they having completed the said works in accordance with the terms of the above contract and having rendered to you their final progress claim dated 8 April 1998 for the sum of RM351,386.84, they have not been paid that sum or any part thereof to date.

Furthermore, the retention sum to be paid by 1 April 1998 also remains unpaid.

As joint venture partners, our client holds each of the joint venture partners jointly and severally liable for payment of the said sum of RM351,386.84 and the retention sum.

We are therefore instructed to demand from you, which we hereby do, the said sum of RM351,386.84 and the retention sum payable.

TAKE NOTICE that should you fail to pay to our client the said sum of RM351,386.84 and the retention sum payable together with our notice charges of RM105.00 within FOURTEEN (14) DAYS from the date hereof, we have strict instructions to commence legal action against you to recover the same with interest and costs.

Yours faithfully
for CHOOI & COMPANY

Sgd. (Illegible).
AJIT KUMAR HASTIR

cc: clients
By Fax No. 9438063 & POST

To confound the matter further, there was no supporting document to prove the exact amount that was claimed by the plaintiff (see the averments in paras. 22 and 23 of encl. 9).

Conclusion

On the facts, this was certainly not a case for an O. 14 application. It was foolhardy on the plaintiff's part to seek summary judgment against the second defendant under an O. 14 application. On the facts, the plaintiff could not prove its claim clearly. The second defendant, on the other hand, was able to show that there were triable issues to be tried. This was not the case where "the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant" (per Jessel M.R. in *Anglo-Italian Bank v. Wells and Davies* [1878] 38 LT 201, CA).

For the reasons adumbrated above, I accordingly dismissed the appeal in encl. 11 with costs.